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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1028

FRED R. FIELD, JR., individually and as President of the New York District Council of the International Longshoremen's Association, Executive Officer of Local 856, and on behalf of all longshoremen, seamen and citizens whose rights are involved and/or have an interest in the establishment of the World Trade Center in the downtown area of the Borough of Manhattan, City and State of New York,

Petitioner,

against

UNITED STATES OF AMERICA, THE CITY OF NEW YORK, and THE PORT OF NEW YORK AUTHORITY,

Respondents.

BRIEF OF CITY OF NEW YORK IN OPPOSITION TO PETITION FOR CERTIOARI

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Issues Involving the City of New York

1. Do longshoremen who work or seek work on Hudson River piers have a constitutional or other federal right entitling them to a declaration that the City of New York, in a regular exercise of power over its water-front, may not demolish piers on city-owned land under water and, under a permit granted by the United States Army, Corps of Engineers, reclaim the land under water by deposit of fill from excavation for the adjacent World Trade Center project?

2. Plaintiff's statement of "Questions Presented" raises the issue of "tax benefits discriminatory to the general public" (Pet., p. 3). His brief fails to develop the matter. The issue is frivolous in view of the allegation in the complaint that the City of New York is vested with power to levy and collect taxes on all real estate except such "as is lawfully exempt from such taxes" (p. 25, par. Tenth). The World Trade Center is exempt from such taxation. N. Y. Unconsol. Laws, § 6611 (McKinney's Ed., Book 65, Part 2.)

Facts

In this action for declaratory judgment, the president of a longshoremen's union sues individually and on behalf of all longshoremen, seamen and citizens "whose rights are involved and/or have an interest in the establishment of [the] World Trade Center" (Caption of complaint). The complaint challenges not only the establishment of the World Trade Center but a related landfill of 23.5 acres of land submerged under the Hudson River, south of the Trade Center, for the site of Battery Park City.

Pursuant to an agreement between the City of New York and the Port of New York Authority, the fill is being taken from excavation for the World Trade Center proj-

ect (13).* The reclamation of the land under water, approved by a permit of the Department of the Army, Corps of Engineers, involves the destruction and elimination of Piers 3-13 (28). The Secretary of the Army determined, on the basis of engineering studies, that the reclamation "is adequate to preserve and maintain the remaining navigable waterway" (59).

After this action was commenced, Congress approved the action of the Army Corps of Engineers in granting the permit. Legislation enacted in 1968 provides in part:

> "Those portions of the East and Hudson Rivers in New York County, State of New York, lying shoreward of a line within the United States Pierhead Line as it exists on the date of enactment [August 13, 1968] of this Act, and bounded on the north by the north side of Spring Street extended westerly and the south side of Robert F. Wagner, Senior Place extended eastwardly, are hereby declared to be non-navigable waters of the United States within the meaning of the laws of the United States." 33 U. S. C. § 59c-1; Pub. L. No. 90-483, § 113 (Aug. 13, 1968).

Stripped of its rambling and generalized allegations of the wrongful character of the several actions of the defendants, the complaint attacks the Trade Center's tax subsidy as an

> "unfair competitive advantage to a real estate development undertaking and operation to the prejudice of the plaintiffs",

which constitutes favoritism to limited groups (27-28).

The landfill operation and pier elimination is claimed to be

> "in violation of the Constitutional rights of the plaintiffs to the use and benefit of waterfront property and piers and the free use of navigable waters" (28).

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* Unless otherwise indicated, numbers in parentheses refer to pages of the Appendix in the Court of Appeals for the Second Circuit.

So far as the piers are concerned, the complaint alleges that the members of plaintiff's longshoremen's union, dependent on activity on the downtown Hudson River piers, have lost their means of livelihood (30-31). Beyond identifying Piers 3-13, the complaint is silent as to whether the piers were in use and service by any members of the union.

Opinions Below

(1)

So far as the City of New York is involved, the District Court for the Southern District of New York (BAUMAN, J.), ruled there is not statutory or other basis for jurisdiction (Pet., pp. A 3-A 9).

It held that the piers, except to the extent that Congress imposed limitations, were under municipal control and their removal for a public purpose did not involve a denial of due process of law, and that plaintiff's claim of a constitutional right to use the piers is frivolous.

On the issue of tax exemption, the Court declined to entertain plaintiff's requests for a determination under the Declaratory Judgment Act. The issue, it ruled, would be more appropriately heard in the New York State courts.

(2)

The Court of Appeals for the Second Circuit unanimously affirmed the judgment of the District Court, without opinion.

ARGUMENT

The land under water in controversy was filled by its owner, the City of New York, with the concurrence of the federal government in an exercise of lawful power. Plaintiff, without a property interest in the land under water, has no right under federal or state law to oppose its reclamation and the incidental elimination of the piers erected over it.

(1)

The City of New York's title to the land under water surrounding the island of Manhattan is derived from grants in colonial charters and from the State of New York. In 1807 the State of New York granted to the City a strip of land under water along the westerly side of the island extending 400 feet into the Hudson River. *Appleby* v. *City of New York*, 271 U. S. 364, 366 (1926). In 1871, pursuant to statute, letters patent were given to the City granting lands under water in the Hudson River, 1,000 feet outshore of the east line of West Street, between the Battery and West 11th Street. The letters patent, dated September 28, 1871, are recorded in Liber 1194, Cp. 651. The reclaimed area in question is within the 1,000 foot line. See copy of tracing at page 57 of the Appendix. It is clear that these lands under water were conveyed to the City "to enable it to fill them up as the interest of the city might require, and to regulate and control the wharves and wharfage." *Langdon* v. *Mayor*, 93 N. Y. 129, 144 (1883).

The title derived from the state is subject to the paramount control of Congress through laws passed in pursuance of the constitutional power to regulate commerce. *People* v. *N. Y. & S. I. Ferry Co.*, 68 N. Y. 71, 78 (1877). The paramount control of Congress is limited to matters pertaining to or affecting navigation or commerce; and, subject to such limitation, control of navigable waters is vested in the state. *Appleby* v. *City of New York*, 235

N. Y. 351, 361, 139 NE 474, 475-476 (1923), rev'd. o.g., 271 U. S. 364 (1926).

Coupled with the City's title to land under water is a delegation of the State's sovereign power over the waterfront. This power, generally conferred on all cities by New York General City Law, § 20, subd. 8, is restated in New York City Charter, § 1303, subd. 2.

The actions taken by the City and by the Port of New York Authority on its behalf in the elimination of Piers 3-13 and the reclamation of the land under water were lawfully accomplished under the powers granted to the City and approved, so far as they affect navigation, by the federal government. Neither the complaint, nor plaintiff's brief, challenges the regularity of pier elimination or land fill so far as the City's power is concerned. Plaintiff's challenge takes the form of conclusory charges that the Army's permit was illegally issued and that the elimination of the piers and dumping of fill violated unspecified constitutional rights of the plaintiff and members of his union (28; Pet., pp. 3-12).

The specifics of the challenge are discernible only from plaintiff's affidavits submitted in opposition to the motions to dismiss the complaint. He argues that "the public has a constitutional right to the free and unrestricted use of the navigable waters of the United States" (49). The Hudson River, his argument continues, "has been destroyed of its former navigation capacity by creation of a land fill in violation of federal statutes" (44). The filled land, he says, has been unlawfully alienated for private use (50). To the extent that plaintiff's argument is directed to the permit issued by the Department of the Army, although it poses a federal question, it is without merit. The Obstructing Navigable Waters Act (33 U. S. C. § 403) permits filling of land under water on plans recommended to the Secretary of the Army by the Corps of Engineers. The Secretary has determined that the reclamation in controversy "is adequate to preserve and maintain the remaining navigable

waterway" (59). Plaintiff does not have standing to challenge that determination. *Sound Marine & Machine Corp.* v. *Westchester County,* 100 F. 2d 360, 363 (2d Cir., 1939), cert. den. 306 U. S. 642 (1939). In addition to the permit, plaintiff must overcome the Congressional declaration of the non-navigability of the waters in question (*ante,* p. 3).

To the extent that plaintiff argues, apart from the matter of the Department of Army permit, that the navigable capacity of the Hudson River has been impaired, he does not raise a federal question involving the City of New York. The right of navigation is a public right belonging to the people at large and may be regulated by the State of New York, and by the City under its delegated power, subject to vested rights of individuals and the public trust in the river as a waterway. *Appleby* v. *City of New York, supra,* 271 U. S. at pp. 394-395.

Plaintiff and the longshoremen he represents do not have a proprietary or other special interest in the river, the piers, or the shorefront. Plaintiff suggests that a longshoreman's right to earn a livelihood is the equivalent of a property right (Pet., p. 11). The character and extent of such employment does not give them greater rights in the river than the general public on whose behalf the City acts. *Delaware & Hudson Coal Co.* v. *Lawrence,* 2 Hun 163, 194 (N. Y. Sup. Ct., 1973), aff'd 56 N. Y. 612 (1874).

Nor does the public trust in the preservation of the river as a water highway entitle plaintiff to challenge the land fill. A navigable waterway need not be maintained at its original width. As stated in *Appleby* v. *City of New York, supra,* 271 U. S. at p. 394:

> "The control of the state for purposes of the trust can never be lost, except as to such parcels as are used in promoting the interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining."

Both of these conditions are satisfied. A land fill extending 700 feet into a mile-wide river, approximately to the old pierhead line, does not impair the navigability of the river. Under New York law, the use is public although the reclaimed land is not devoted to commerce or navigation. N. Y. Gen. City Law, § 20, subd. 8.

Subdivision 8 was amended recently to permit use of the waterfront and waterways of municipalities for any business or public purpose, as well as for commerce and navigation. The amendment recognizes the need for maximum utilization of available land resources to relieve "space pressures upon municipalities for recreation, housing and commercial sites" (2 McKinney's *Sessions Laws of New York* [*1970*], p. 3022). Indeed, for over three hundred years the City of New York has been developed by reclamation of surrounding land under water.

In reality, plaintiff does not complain about his right to navigate the Hudson River, that is, to use it as a water highway. His grievance is that Piers 3-13 have been destroyed as an incident of the land fill. As the District Court noted, plaintiff would be content if the reclaimed land had been used as a pilot terminal for containerized shipping (18). This is a tacit recognition of the decrepit state of the piers, a condition that was recognized in the preamble to the enabling legislation for Battery Park City, in part, as follows (N. Y. Pub. Author. Law, § 1971):

> "It is hereby found and declared that there exists on the lower West side of the county of New York, North of Battery Park and on and adjacent to the Hudson River, a blighted area marked by substandard, insanitary, deteriorated and deteriorating conditions, in which there exists obsolete and dilapidated buildings and structures, including piers * * *
>
> It is further found and declared that such area is no longer suitable or useful for piers * * *
>
> It is hereby declared that the improvement of such area, the elimination of pier facilities and of the

> present structures therein, and the replanning, reconstruction and redevelopment of such area including the filling of the Hudson River at such area up to the present pierhead line, the preparation of such land for development * * * is necessary for the prosperity and welfare of the people of the City of New York and of the state as a whole, and is a public use and public purpose * * *."

Cleared of its navigational coloring, the complaint does not state a cause of action against the City of New York. The City has plenary power over its piers. N. Y. Gen. City Law, § 20, subd. 8; New York City Charter, § 1303, subd. 2. There being no conflict with federal jurisdiction, the City may exercise such power as it sees fit. *Gilman* v. *Philadelphia*, 3 Wall. (70 U. S.) 713, 729 (1865).

(2)

In support of his position, the petitioner cites *Utah* v. *United States*, 403 U. S. 9 (1971) (Pet., p. 7). *Utah* involved conflicting claims between Utah and the United States to the shorelands around the Great Salt Lake. Utah's claim to the lands depended upon whether the lake was navigable at the time Utah achieved statehood in 1896. If the lake was then navigable, Utah would be entitled to the shorelands. This Court, stating that the question of navigability was a federal question, had directed a special master to determine whether the Great Salt Lake was navigable in 1896. His report found that the lake was navigable. In confirming the report of the master, the Court awarded the lands to Utah.

In this case, unlike in *Utah*, Congress specifically resolved the federal question by declaring the filled area to be "non-navigable" waters within the meaning of the laws of the United States (*ante*, p. 3). Additionally the petitioner in this case, unlike the plaintiff State in *Utah*, does not have a proprietary interest in the waterway. Any question relating to navigability of the Hudson river could only be raised by the State of New York or by New York City under its delegated power (*ante*, p. 7).

CONCLUSION

The petition for writ of certiorari should be denied.

February 20, 1973.

Respectfully submitted,

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